NC. 21,075

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

P. UNTALAN, as administrator he Estate of TRINIDAD T. CALVO, ased, and LUIS P. UNTALAN, as llary administrator of the te of ISMAEL T. CALVO, deceased, VICENTA T. CALVO, Brief for Appellants Appellants vs. M. CALVO, PAUL M. CALVO, as nistrator of the Estate of OCT 1 9 1986 RDO T. CALVO, deceased, RD M. CALVO, THOMAS J. M. WM. B. LUCK, CLERK O, VERONICA M. CALVO and RDO T. CALVO,

Appeal from Order Civil Case No. 112-65

Appellees

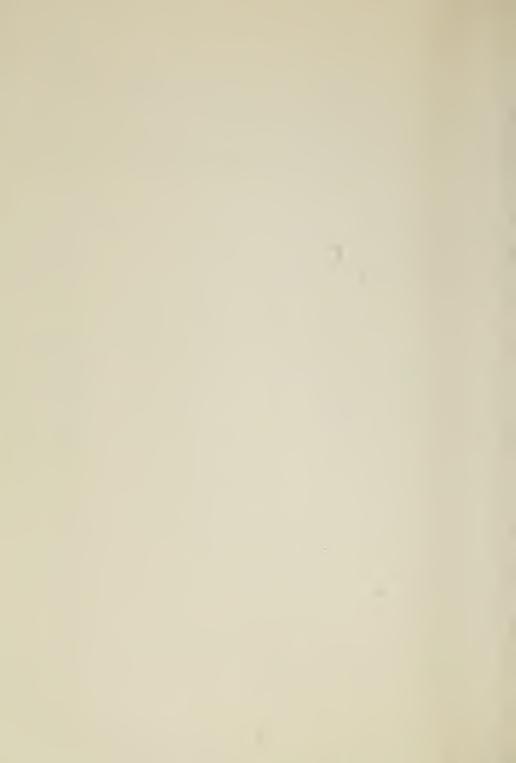
District Court of Guam

Territory of Guam

ARANCES:

DAVID M. SHAPIROE. R. CRAINAttorney for AppellantsAttorney for AppelleesP.O. Box 864, Agana, Guam 96910P.O. Box 906, Agana, Guam 9691

NOV A1085



SUBJECT INDEX

JB	JECT		PAGE	
ır	isdi	ction	1	
atement of the case				
		The facts Order transferring action reviewable on appeal	2 4	
r	ors	relied upon	6	
g	umen	t	7	
	1.	District Court not authorized to transfer action to Island Court	7	
	2.	District Court erred in finding appellants not empowered to file action therein	9	
	3.	District Court erred in finding jurisdiction dependent upon precedent exercise Island Court jurisdiction	13	
	4.	Addition indispensable parties conferred jurisdiction upon District Court	15	
	5.	Court erred in transferring action before involuntary plaintiffs allowed to answer	16	
	6.	Island Court does not have jurisdiction to afford relief prayed for	16	
	7.	District Court erred in finding misjoinder and in effect dismissing Count II of		
		appellants' complaint therefor	17	
nclusion			17	

TABLE OF AUTHORITIES CITED

PAGE

SES

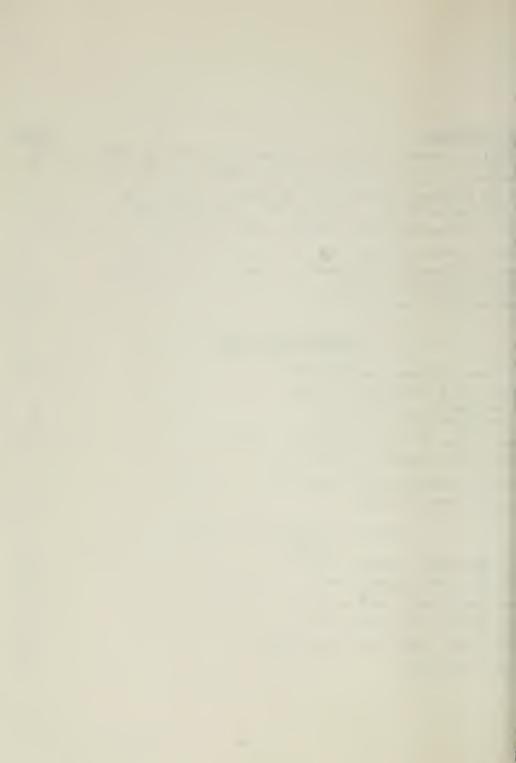
drade v. Superior Court, 75 C. 459, 17 P. 531 1	.4
rber v. Superior Court, 43 Cal.App. 221, 184 Pac. 952 1	. 3
Bottoms 156 Cal. 129, 103 Fac. 849 1	1
Clos, 110 Cal. 494, 502, 42 Pac. 971 1	.0
Fernandez, 119 Cal. 579, 581, 51 Pac. 851 1	1
Fulmer, 203 Cal. 693, 265 P. 920, 58 A.L.R. 430 1	.0
iggs v. Clark, 23 Cal. 427	4, 1
lmer v. Superior Court, 220 Cal. 71, 73, 29 P.2d 75 8	;
ller v. Reagh, 150 C.A.2d 99 309 P2d 826 4	
ople v. Olvera, 43 Cal. 492	0
berts v. Western Pac. R.R. Co., 104 Cal.App.2d 816, 232 P2d 560	
binson v. Superior Court, 35 Cal. 2d 379, 218 + 2d 10 5	



SES CONTINUED	PAGE
mpsell v. Superior Court, 32 C.2d 763, 197 P.2d /39	8
Smith, 118 Cal. 462, 466, 50 Pac. 701	10
ate of Indiana ex. rel. Juan S. Lopez v. Alvina M. Killigrew et al., 174 N.E. 808, 74 A.L.R. 631	9
mple v. Superior Court, 70 Cal. 211, 11 P. 699	. 8
eller v. Such, 57 Cal. 447	14
aver v. Pasadena Tournament of Roses, 32 Cal.2d 833, 198 P.2d 514	5
lson v. Roach, 4 Cal. 362	.15
STATUTES AND RULES	
vil Code of Guam, Section 2431	15
de of Civil Procedure of Guam Section 62 Sections 82(4) and 82(5)	7 7
	,

deral Rules of Civil Procedure, Rule 21	17
ganic Act of Guam, Section 22(a)	7
U.S.C., Sections 1291 and 1294	1
U.S.C., Section 1424	1

TEXTS	
Am. Jur. 493, Section 215	10
Am. Jur. 880, Section 905	13
Am. Jur.2d 453, Section 93	8
Am. Jur.2d 455, Section 94	9
6 Cal. Jur. 383, 384, Section 961	12
Cal. Jur.2d 390	14



NO. 21,075

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

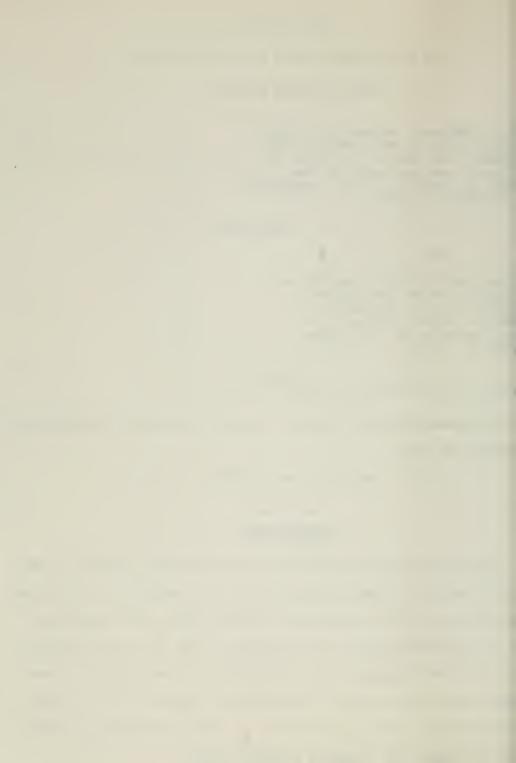
UIS P. UNTALAN, as administrator)) f the Estate of TRINIDAD T. CALVO,)) eceased, and LUIS P. UNTALAN, as)) ncillary administrator of the)) state of ISMAEL T. CALVO, deceased,)) nd VICENTA T. CALVO, deceased,)) Appellants)) vs. AUL M. CALVO, PAUL M. CALVO, as)) dministrator of the Estate of)) DUARDO T. CALVO, deceased,)) DWARD M. CALVO, THOFAS J. M. ALVO, VERONICA M. CALVO and)) ICARDO T. CALVO,)

On appeal from the District Court of Guam for the Unincorpor erritory of Guam.

BRIEF FOR APPELLANTS

JURISDICTION

Jurisdiction of the District Court of Guam is based on 48 .S.C., Section 1424. Jurisdiction of this appeal in this court s based on 28 U.S.C., Sections 1291 and 1294. The complaint R1) and amended Count I of complaint (R 14) are the pleadings hich show the existence of jurisdiction of the District Court f Guam over this action. The notice of appeal (R 27) is the leading which shows the existence of the jurisdiction of this ourt to review the judgment appealed from.



STATEMENT OF THE CASE

A. The facts.

Appellants, Luis P. Untalan, as administrator of the tate of Trinidad T. Calvo, deceased, and Luis P. Untalan, as cillary administrator of the Estate of Ismael T. Calvo, deceased November 8, 1965 filed Complaint for Dissolution of Partnerips, for Accounting and Discovery of Assets (R 1) of two partner ips, viz: (1) Tomas A. Calvo & Sons, composed of Trinidad T. lvo (now deceased), Eduardo T. Calvo (now deceased) and Ricardo Calvo (Count I of R 1); and (2) Stud-Pac Motor Company, comsed of the three partners comprising the partnership of Tomas Calvo & Sons, in addition to Ismael T. Calvo (now deceased) ount II (2) of R 1); or in the alternative, composed of Ismael Calvo (now deceased), Eduardo T. Calvo (now deceased) and cardo T. Calvo (Count II (3) of R 1). The amount in controversy der each count of said complaint exceeded \$2,000.00 exclusive costs and interest (Count I (1)(4) and Count II (1)(8) of R 1).

Appellees filed motion to dismiss said complaint on nuary 18, 1966 (R 12) because of misjoinder (Paragraph 1 of 12),failure to join indispensable parties (Paragraph 2 of R 12) d lack of jurisdiction, because claims of said appellants benged in the estates of Eduardo T. Calvo, deceased or Ismael T. lvo, deceased. The motion was suscained as to Count I of the mplaint on the ground that indispensable parties were not joined d denied as to Count II of the complaint (Tr. page 11, lines to 14, inclusive). Thereupon appellants filed Amended Count I Complaint for Dissolution of Partnerships, for Accounting and scovery of Assets (R 14), joining Daniel I. Calvo, Ralph M.

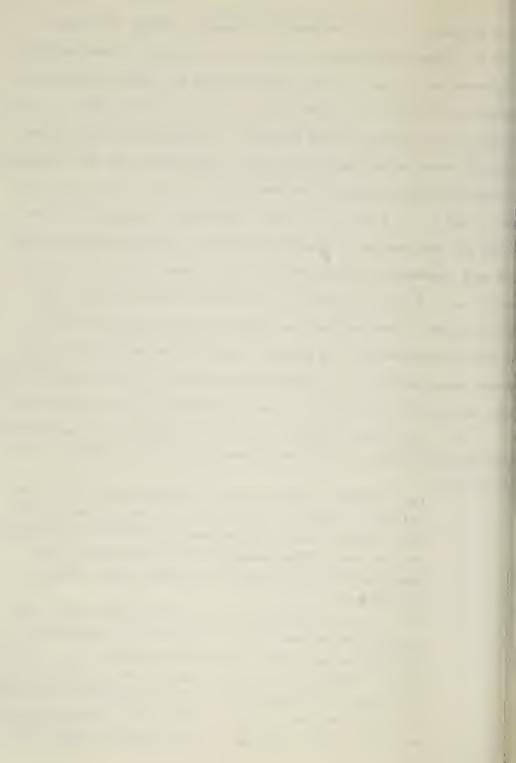


1vo, Bertha A. Toves, Barbara M. Edwards, Thomas G. Calvo, sita C. Calvo and Vicenta T. Calvo as Guardian of the persons d estates of Victor T. Calvo and Mildred R. Calvo, minors, as voluntary plaintiffs (Count I(2) of R 14). Before any of said voluntary plaintiffs filed answers or appeared in this action e trial court scheduled a pre-trial conference for the purposes determining the issues involved (Tr. 14 lines 2 to 7; Tr. 16 nes 1 and 2, 7, 8 & 9, 11 & 12). Appellants objected to the lding of the pre-trial conference before the involuntary plainffs had appeared or answered (Tr. 14, lines 20 to 23; Tr. 16 nes 3, 4, 5 & 6). On April 11, 1966 the court entered its etrial Order transferring the action to the Island Court of am for determinations in probate and for the exercise of its bate jurisdiction as a condition precedent to the jurisdiction the District Court (R 21, first paragraph), further ordering:

"1. The above action, Civil No. 112-65, is transferred the Island Court for the consideration of that Court and demination:

(a) Whether the Court has jurisdiction within the existing estates to grant any relief properly due.
(b) Whether the Court wishes to approve litigation on the part of the administrator and permit the administrator to charge the estate with costs of litigation.

(c) If the Island Court snall determine that the administrator shall be authorized to undertake such litigation and snall approve an action in the District Court, the case may be re-transferred to the District Court as to the Trinidad T. Calvo interest, but the administrator must file a second and different action as to any other estate." (R 21, bottom page 2 and top page 3).

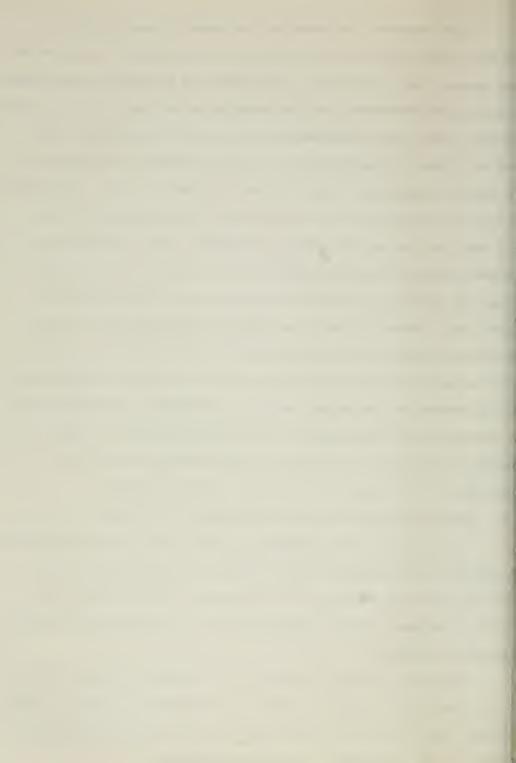


Such transfer was made on the court's own motion at a -trial conference which was being held to merely determine the ues before the involuntary plaintiffs had appeared or answered. court made statements in the pretrial order without any evidence support them; said statements are denied by appellants, who uld be given the opportunity to offer evidence in support of ir case. Appellants filed Notice of Appeal (R 27). Appellants e that the District Court of Guam had jurisdiction of this ion and that it had the duty to exercise said jurisdiction. cannot legally divest itself of said jurisdiction by transring the action to an inferior court whose jurisdiction is ited, said inferior court not having jurisdiction to fully ermine the controversies contained in said action. It is ther urged that the Island Court of Guam has no jurisdiction fully determine the rights of the involuntary plaintiffs who e joined at the insistence of the District Court of Guam. tainly the Court is required to adjudicate the rights of ties which it insisted on bringing into the action.

B. Order transferring action reviewable on appeal.

The order of the District Court of Guam in transferring s action to the Island Court of Guam for determination in bate and for the exercise of its probate jurisdiction as a dition precedent to the jurisdiction of the District Court is iewable on appeal.

Muller vs. Reagh, 150 C.A. 2d 99; 309 P. 2d 826 holds t an order of the Superior Court transferring a cause to the icipal court upon the ground that the superior court lacks isdiction is appealable. The court stated:



"... It happens that our reviewing courts have upon occasion entertained appeals from orders like the order here involved, notably in these cases: Weaver v. Pasadena Tournament of Roses Assn. (1948), 32 Cal. 2d 833 (198 P.2d 514), affirming a superior court order transferring a cause to a justice's court; Roberts v. Western Pac. R.R. Co. (1951) 104 Cal.App.2d 816 (232 P.2d 560), affirming an order transferring an action from the superior court in San Francisco to the municipal court of San Francisco (petition for a hearing by the Superior Court denied, p. 821). It is true that in neither of these cases do we find a discussion of the appealability of the order. That might mean that such a question did not occur to the court or it may mean that the court considered the appealability of the order too clearly manifest to require comment. We think the latter is the correct view..."

The court pointed out that in the case of Robinson v. Superior urt, 35 Cal. 2d 379, 218 P2d 10 (cited by defendant as authority r the proposition that mandamus was the proper remedy) the trial urt decided that appeal was the proper remedy, although it allow ndamus: "...True, the Supreme Court there entertained mandate en though it decided there was a remedy by appeal. It did so view of the fact that until then there had been no certainty ether or not the order there in question was appealable. It es not follow that whenever there is uncertainty an aygrieved rty must pursue mandate only..."

Said order of the District Court is final and appealable.) As to the estate of Trinidad T. Calvo (R 14) the District wrt has lost control of the action in that it is discretionary th the Island Court as to whether or not the action will be reansferred to the District Court (R 21). (2) As to the estate mael T. Calvo (Count I, R 1) the court has completely divested



joinder (R 21, bottom page 2 & top page 3).

ERRORS RELIED UPON

The following are the errors upon which appellants rely:

1. The District Court of Guam had jurisdiction of this ion, was under the duty to try same and was not authorized to nsfer same to the Island Court of Guam.

2. The District Court of Guam erred in finding that ellants, Luis P. Untalan, as administrator of the estate of nidad T. Calvo, deceased, and Luis P. Untalan, as ancillary inistrator of the estate of Ismael T. Calvo, deceased, were empowered to file this action in the District Court of Guam ause said administrators did not obtain the permission of the and Court of Guam to do so.

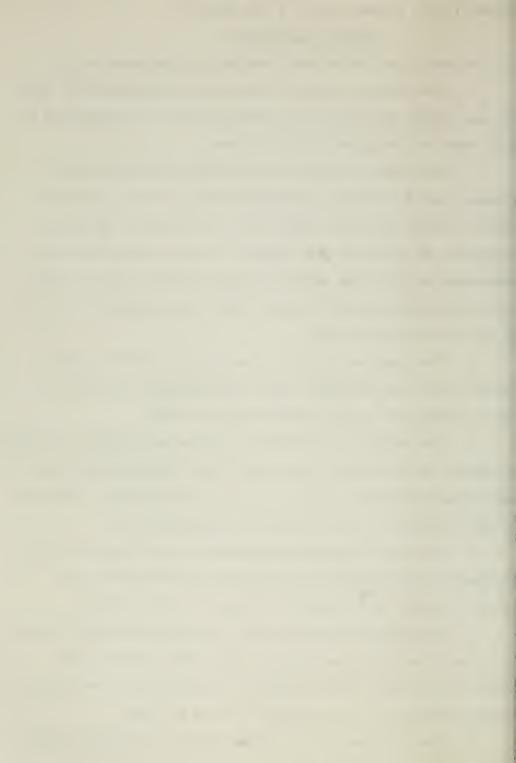
3. The District Court of Guam erred in finding that jurisdiction was dependent upon the precedent exercise of bate jurisdiction in the Island Court of Guam.

4. The addition of Vicenta T. Calvo as plaintiff and the er parties as involuntary plaintiffs gave the District Court Guam jurisdiction over Count I (R 14) of this action, and rered said District Court of Guam to adjudicate same.

5. The Court erred in transferring this action to the and Court of Guam before the involuntary plaintiffs were ved with process and allowed to answer in said action.

6. The District Court erred in transferring this action the Island Court of Guam because that court does not have isdiction to settle the accounts of the parties or to afford relief prayed for in the District Court of Guam.

7. The District Court of Guam erred in finding a mis-



mplaint (R 1, Count II) for misjoinder.

ARGUMENT

 The District Court of Guam had jurisdiction of this action, s under the duty to try same and was not authorized to transfer me to the Island Court of Guam.

Section 62 of the Code of Civil Procedure of Guam reads: "Original jurisdiction. Under Section 22(a) of e Organic Act of Guam the District Court of Guam has the original risdiction of a district court of the United States in all uses arising under the laws of the United States and has original risdiction in all other causes in Guam except those over which iginal jurisdiction has been transferred to and vested in the land Court of Guam by Section 82 of this title. If it appears at an action or proceeding brought in the District Court is tually within the jurisdiction of the Island Court the District urt shall transfer it to the Island Court for hearing and termination.

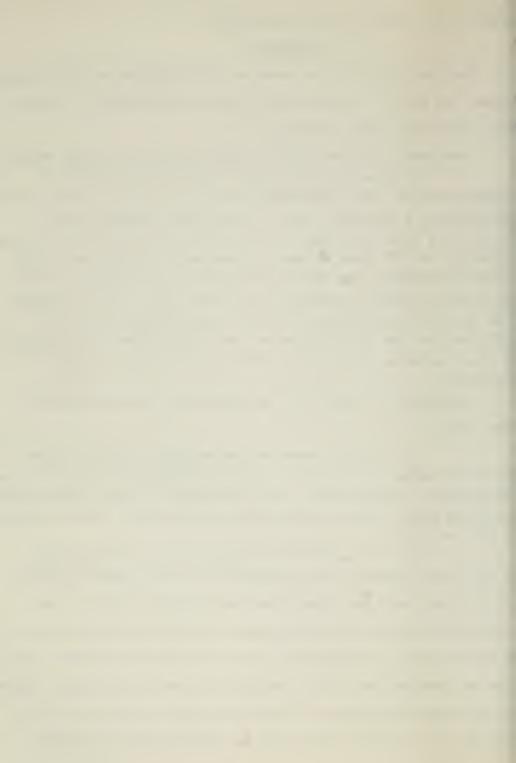
Sections82(4) and 82(5) of the Code of Civil Procedure Guam reads:

"4. In all cases at law under the laws of Guam which the demand, exclusive of interest and costs, or the value the property in controversy does not amount to more than \$2,000 cept cases which involve the legality of any tax, impost, assessnt, toll or fine;

"5. In actions for dissolution of partnership, ere the total assets of the partnership do not exceed \$2,000;"

It is clear from the above that the District Court of Guam s jurisdiction of the controversies contained in this action, nce the amounts in controversy exceed the sum of \$2,000.00, exusive of interest and costs, and the original jurisdiction therehas not been transferred to the Island Court of Guam by said ction 82. It is also clear that the District Court of Guam

v transfer an action to the Island Court only when the action



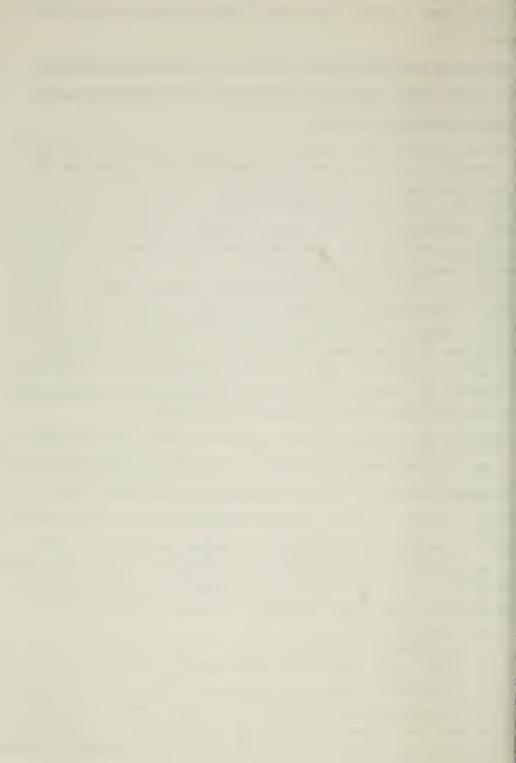
ould have been filed in the Island Court of Guam in the first

Since the District Court of Guam has jurisdiction of this ion it was under the duty to exercise that jurisdiction and render a decision therein.

20 Am. Jur.2d 453: "Section 93. Duty to exercise jurisdicon. Generally, a court having jurisdiction of a case has not by the right and the power or authority, but also the duty, to ercise that jurisdiction, and to render a decision in a case operly submitted to it. It cannot properly decline to exercise a jurisdiction merely on the ground of the motive or ulterior pose of the plaintiff in bringing the suit. And state courts a not free to decline the jurisdiction conferred upon them by agress in cases based on federal statutes if such cases are thin the scope of the ordinary jurisdiction of the state courts prescribed by local laws...Failure of a court to adjudicate its merits a case over whic.. it has jurisdiction may be ground reversal, on appeal, or its duty to exercise its jurisdiction be enforced by way of a mandamus proceeding..."

Sampsell vs. Superior Court, 32 C2d 763, 197 P.2d 739 held at a writ of mandamus should issue to compel the Superior Court Los Angeles County to hear an application for order awarding ditioner custody of child pending a divorce action. The court ted: "...Mandamus is available to compel the court to give full hearing in the case before it, although it is not available inform the trial court as to how it should rule with respect the merits of the case. (Hilmer v. Superior Court, 220 Cal. 73 (29 P2d. 175))..."

"...In the early case of Temple v. Superior Court, 70 Cal. (11 P. 699), this court held that mandamus should issue to apel a trial court to hear and determine a proceeding to have berson adjudged guilty of contempt, although the trial court d dismissed the proceeding 'on the ground of want of jurisdicon' because the case came within Code of Civil Procedure section b. The court stated in that case that 'We have examined the

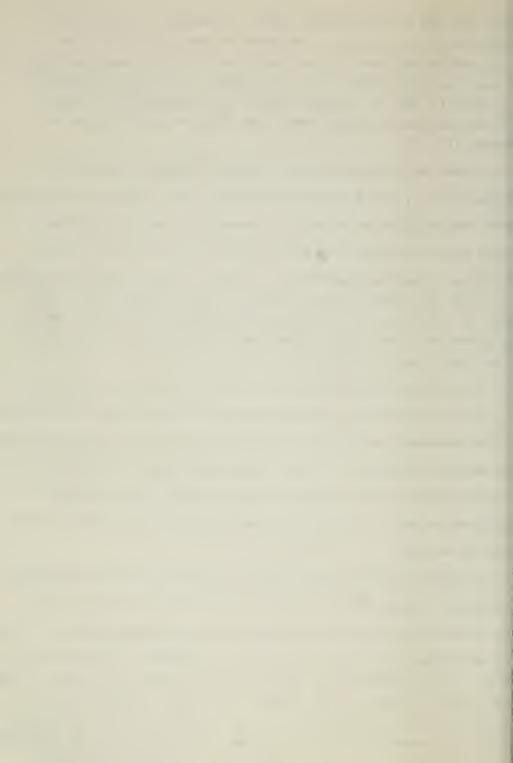


ord, and are of the opinion that the matter is within the isdiction of the court. The facts stated bring the case arly within section 1210 of the Code of Civil Procedure, and der such circumstances the court cannot, by holding without ason that it has no jurisdiction of the proceeding, divest self of jurisdiction, and evade the duty of hearing and demining it'..."

In State of Indiana ex. rel. Juan S. Lopez v. Alvina M. ligrew et al., 174 N.E. 808, 74 A.L.R. 631, the court held that ator was entitled to a writ of mandate to compel defendants allow him to file his verified petition for a writ of error ram nobis. The court stated: "...When a court has jurisdiction ir a class of cases and one seeking relief invokes the juristion of the court in the manner prescribed by law, the partiar cause is, ipso facto, under the jurisdiction of the court the court cannot refuse jurisdiction..."

2. The District Court of Guam erred in finding that appelats, Luis P. Untalan, as administrator of the estate of Trinidad Calvo, deceased and Luis P. Untalan, as ancillary administrator the estate of Ismael T. Calvo, deceased, were not empowered to e this action in the District Court of Guam, because said Ministrators did not obtain the permission of the Island Court Guam to do so.

It is noted that the court made a finding that the permission the Island Court of Guam was not obtained for filing of commint in this action (R 21 middle page) <u>on its own motion</u> contrary law as stated in 20 Am. Jur.2d 455 as follows: "Section 94. Fisdiction as dependent on application by party for relief. The meral rule is that a court cannot undertake to adjudicate a entroversy on its own motion; it can do this only when the conmersy is presented to it by a party, and only if it is presented it in the form of a proper pleading. A court has no power



ner to investigate facts or to initiate proceedings. Before may act there must be some appropriate application invoking judicial power of the court in respect to the matter sought be litigated..."

No issue as to permission of the Island Court was raised by ellees. Therefore the finding of the court should have no effect

It is well settled that if the acts of an administrator are oursuance of and in accordance with law, he need not secure an er of court to protect him in the discharge of his duties.

21 Am. Jur. 493: "Section 215. Necessity of Court Order for cection.-If the acts of an administrator are in pursuance of, in accordance with law, he need not secure an order of court protect him in the discharge of his duties..."

To the same effect, see re Fulmer, 203 Cal. 693, 265 P. 920, .L.R. 430 in which the court stated: "...That some of the re-enumerated disbursements may have been made without prior tion of the probate court is not necessarily fatal to their wance. The sums of money paid out of taxes and necessary res are such expenses as the administrator must pay in the care management of the estate. People v. Olvera, 43 Cal. 492; Re , 110 Cal. 494, 502, 42 Pac. 971; Re Smith, 118 Cal. 462, 466, Pac. 701. In Re Smith, supra, it is stated to be 'the duty of executor, without special direction of the court, to preserve property of the estate, and he does not require leave of the t so to do, and it is a question how far an order so obtained . protect an administrator either in doing or in omitting to do thing which might be deemed important. When the court is so sulted the heirs are not specially cited, but on the settlement the accounts of an executor they are called in and have a right uestion the acts of the executor and to have an appeal to this t upon any determination which may be made. The previous conto the acts of the executor cannot limit their inquiry as to lawfulness of the acts done or the duty of the executor to do which has been omitted. Ordinarily, it would determine the stion of good faith and guite often that is the only matter



sion. Still, the failure to obtain it does not render the penditures made improper. The only result is, that the matter yet to be passed upon.' Application of this rule disposes of contention of respondents that the court orders above referred were void as being made ex parte and without the prior giving notice. Payments made without a court order are made at the cil of the personal representative (Re Fernandez 119 Cal. 579, 51 Pac. 851); but, if the acts of an administrator are in suance of, and in accordance with, law, he need not necssarily there an order of court to protect him in the performance of his cies (Re Bottoms, 156 Cal. 129, 133, 103 Pac. 849)..."

In Re Bottoms, 156 Cal. 129, 103 Pac. 849, the court held t an administratrix, whose intestate was a vendee under a tract for the purchase of land belonging to the estate of the eased vendor, and who, in his lifetime, had purchased and obned conveyances from some of the heirs of the vendor of their erests in the property, is not limited, in order to perfect title and secure possession of the land for the benefit of estate of the vendee, to the proceedings to compel a conance of the land provided for by sections 1597 et seq. of the e of Civil Procedure. If it was to the advantage of the estate the vendee, she was justified in entering into an arrangement the direct distribution of the land by the estate of the vendor the heirs of the vendee, upon payment being made to the estate the vendor. The fact that such payment was made without persion of the court would not render the expenditure improper, hough its propriety would be subject to investigation at the e of the settlement of the accounts of the administratrix of estate of the vendee.

<u>Unquestionably</u> the administrator of the two estates was horized to bring this action and he did not have to secure per-



ision of the court to do so. Certainly the District Court of m does not have the power, <u>on its own motion</u>, to require such mission as a condition precedent to filing this action.

Section 571, Probate Code of Guam: "Duties of executor. viving partner. The executor or administrator must take into possession all the estate of the decedent, real and personal collect all debts due to the decedent or to the estate. When, the time of his death, a partnership existed between the deent and any other person, the surviving partner has the right continue in possession of the partnership, and to settle its iness, but the interest of the decedent in the partnership t be included in the inventory, and be appraised as other perty. The surviving partner must settle the affairs of the tnership without delay, and account to the executor or adminrator, and pay over such balances as may from time to time payable to him, in right of the decedent. Upon application the executor or administrator, the court or a judge thereof, never it appears necessary, may order the surviving partner render an account, and in case of neglect or refusal may, after ice, compel it by attachment; and the executor or administrator maintain against him any action which the decedent could have ntained."

Section 573, Probate Code of Guam: "Extent of power to sue be sued. Actions for the recovery of any property, real or sonal, or the possession thereof, or to quiet title thereto, to determine any adverse claim thereon, and all actions nded upon contracts, may be maintained by and against executors

administrators in all cases in which the same might have been ntained by or against their respective testators or intestates."

11b Cal. Jur. 383, 384: "Section 961. Accounting and tnership Suits.- Accounting is a relief incident to other suits ch may be brought and maintained. The representative by his eral authority may bring an action for an accounting of moneys ropriated from the estate, in which action he is the only essary plaintiff. He may require accounting from or maintain ion for it against a former representative. Proceedings are 9 provided to compel an accounting by persons who have been



rusted with any part of the estate in trust for the executor administrator.

"The representative in the stead of the decedent may bring accounting suit against an agent of decedent.

"Suits against surviving partner.- The surviving partner of decedent is required to present an account to the executor administrator and pay over any balances due. The representae may maintain against the surviving partner any action which decedent could have maintained, as well as an action for an ounting.

"The jurisdiction vested in the probate court does not divest equity courts of their general jurisdiction over actions of s character..."

21 Am. Jur. 880: "Section 905. -Equitable Actions.-Usually, general equitable remedies are available to an executor or inistrator seeking recovery of assets of the estate or their ue. Thus, he may file a bill for discovery and accounting, n where the administration proceedings are being conducted in ther court, invoke equitable relief against the threatened lation of a contract of the decedent involving secret manuturing processes discovered by the decedent, and compel the ivery of a written instrument for cancelations in a proper e..."

Barber v. Superior Court, 43 Cal. App. 221, 184 Pac. 952 holds t an administrator may, in his own name, for the use and benefit all parties interested in the estate, maintain a suit for an ounting against a former administrator; and in such action, administrator is the only necessary party plaintiff.

3. The District Court of Guam erred in finding that its isdiction was dependent upon the precedent exercise of Probate isdiction in the Island Court of Guam.

The Island Court of Guam sitting as a probate court does not e authority to settle and adjust accounts between a surviving tner and a representative of the deceased partner. Such juris-



controversy exceeds \$2,000.00. The jurisdiction of the Probate art over the estates of deceased persons does not divest the strict Court of Guam of its general jurisdiction as Court of ancery. Sec. 571 Probate Code of Guam, page 12, supra.

20 Cal. Jur.2d 390: "...The probate court has no authority settle and adjust the accounts between a surviving partner the representative of the deceased partner; its power is nited to requiring the surviving partner to account..."

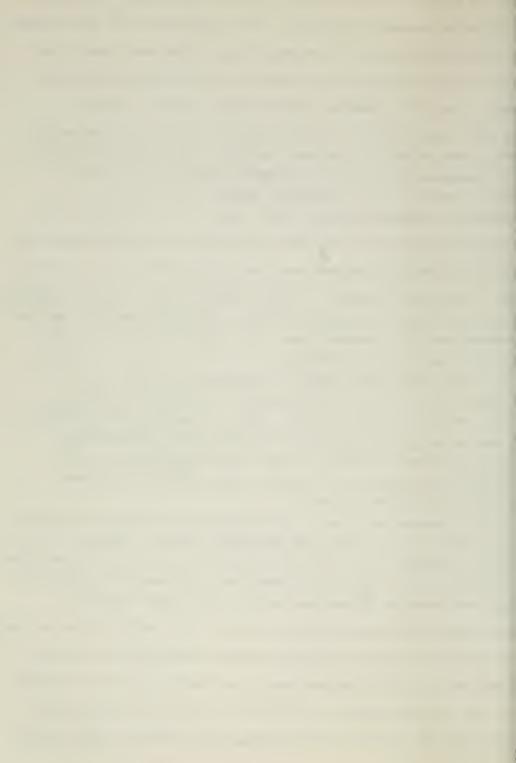
Andrade v. Superior Court, 75 C. 459, 17 P. 531 holds that Probate Court has no authority to settle and adjust accounts ween the surviving partner and the representative of the desed. The court stated: "...The probate court has no authority settle and adjust accounts between a surviving partner and the resentative of a deceased one. Its power is limited to rering the survivor to account...

"...The court cannot settle and adjust the account. If atisfactory, this can only be done by a court of equity. "In Theller v. Such, 57 Cal. 447, it was said the 'probate rt has no more jurisdiction to provide for a partnership ount and decree a balance, where the partnership has been solved by the death of a partner, than where it has been solved by any other cause'...

"...If questions arise in the course of settlement of partship affairs which cannot be adjusted without recourse to the rts, the probate court is not the forum in which such questions be solved, but, like other questions cognizable in courts of ity, they must be determined in the last-named courts..."

The court in Griggs v. Clark, 23 Cal. 427, held that an action the nature of a suit in equity brought by William T. Clark, eased, who in his lifetime was in partnership with the defents, for the settlement of the affairs of a partnership, was

precluded by pending proceedings in the Probate Court. The rt stated:



"... The defendants demurred to the complaint; the Court beoverruled the same, and this is assigned for error. It is tended, that the Probate Court, in which the proceedings for settlement of the estate were pending, had acquired juristion of the subject matter of the present action; and theree the demurrer should have been sustained. The jurisdiction ted in the Probate Court does not divest the District Courts their general jurisdiction as Courts of Chancery over actions this character, as has been held by this Court. (Wilson v. ch, 4 Cal. 362; Clark v. Perry, 5 Id. 58)."

Section 2431. Civil Code of Guam: "Right to wind up. Uns otherwise agreed the partners who have not wrongfully disved the partnership or the legal representative of the last viving partner, not bankrupt, has the right to wind up the tnership affairs: Provided, however, that any partner, his al representative, or his assignee, upon cause shown may obn winding up by the court."

4. The addition of Vicenta T. Calvo as plaintiff and the er parties as involuntary plaintiffs gave the District Court Guam jurisdiction over Count I (R 14) of this action, and rered said District Court of Guam to adjudicate same.

Appellees' motion to dismiss the named appellants' complaint 1) because indispensable parties were not joined was granted . page 11, lines 8 to 11) on the theory that the partnership eement (Exhibit A of R 1) conferred rights upon said indissable parties which should be adjudicated by the District Court Guam. (Tr. page 2, lines 16 to 26). The validity of that tion of the agreement wherein Trinidad T. Calvo seeks to bequeat! assign his share in the partnership (last page Exhibit A of 4) can only be determined by the District Court of Guam -<u>Island Court in Probate has no jurisdiction to pass on the</u> idity of said provision and this action should not have been msferred to the Island Court sitting in probate for that



t (Tr. page 2, lines 23 to 26) the indispensable parties <u>are</u> real parties in interest and appellants are out of court <u>if</u> d provision contained in said agreement is valid, which was the more reason for not transferring the action.

5. The Court erred in transferring this action to the Island rt of Guam before the involuntary plaintiffs were served with cess and allowed to answer in said action.

One of the alleged indispensable parties joined as a voluny plaintiff in this action - the others were joined as involuny plaintiffs - said involuntary plaintiffs were deprived of ir respective opportunities to be heard by the precipitate trans to the Island Court of Guam, sitting in probate.

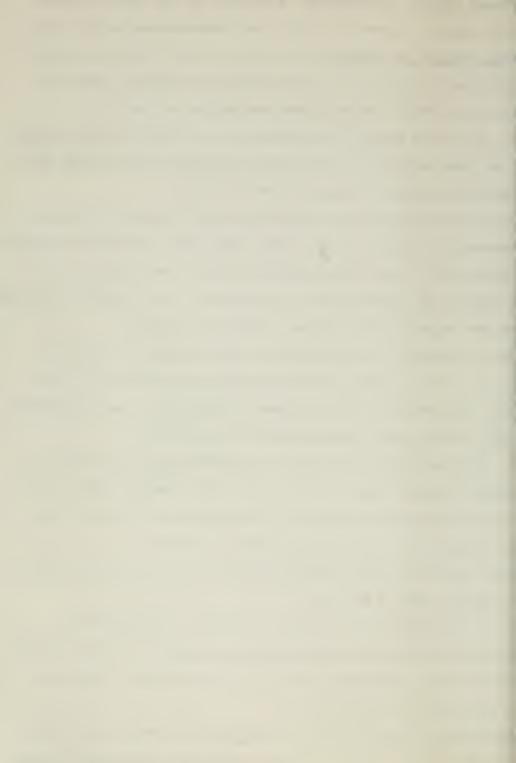
Having ordered that said alleged indispensable parties be ned, no action should have been taken by the District Court Guam, detrimental to said alleged indispensable parties before y had entered their appearances in this action.

6. The District Court erred in transferring this action to Island Court of Guam because that court does not have juristion to settle the accounts of the parties or to afford the ief prayed for in the District Court of Guam.

(See authorities and arguments under specification of error 3, supra, pages 13 to 15).

7. The District Court erred in finding a misjoinder of ses of action in this action without receiving evidence thereand in effect dismissing Count II of appellants' complaint 1, Count II) for misjoinder.

Appellants alleged (Count II, paragraphs 2 and 3, R 1) that nidad T. Calvo, Ismael T. Calvo, Eduardo T. Calvo and Ricardo



style of Stud-Pac Motor Company and in the alternative that partnership was composed of Ismael T. Calvo, Eduardo T. Calvo Ricardo T. Calvo. Such alternative pleading is permissible deral Rules of Civil Procedure No. 8(d)(2). On the face of d complaint, therefore, there was no misjoinder. <u>Even if there</u> <u>a misjoinder</u>, the action should not have been dismissed, but and have been severed and tried separately.

Rule 21, Federal Rules of Civil Procedure: "Misjoinder of ties is not ground for dismissal of an action. Parties may be oped or added by order of the court on motion of any party or its own initiative at any stage of the action and on such terms are just. Any claim against a party may be severed and proded with separately."

CONCLUSION

For the reasons above stated, it is respectfully submitted : the order appealed from should be reversed.

Dated, Agana, Guam

October 12, 1966

Respectfully submitted,

DAVID M. SHAPIRO

Attorney for Appellants

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this of, I have examined Rules 18 and 19 of the United States Court appeals for the Ninth Circuit, and that, in my opinion, the agoing brief is in full compliance with those rules.

harrin

DAVID M. SHAPIRO / Attorney for Appellants

